BATU EMAS ENTERPRISE (SUING AS A FIRM)

v.

SYARIKAT AWANG RADIN (SUED AS A FIRM) & 3 ORS.

HIGH COURT SABAH & SARAWAK, SIBU
TUAN HJ. MUHAMMAD KAMIL BIN AWANG JC
[SUIT NO. 49 OF 1993]
18 JULY 1994

PRACTICE & PROCEDURE: *Order 14 - Plaintiff entering into agreement with 1st defendant to extract sand and gravel from State land - 3rd party signing agreement on behalf of plaintiff - No evidence that 3rd party was a partner in plaintiff company at the material time - Plaintiff claiming breach of contract - Defendant counterclaiming for damages for repudiation of contract by plaintiff - Questions of law and fact - Whether a proper case for summary judgment - 6 months delay in making the application - Whether inordinate delay - Whether failure to explain the delay in affidavit fatal.*

This was an application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 (RHC).

On 17 October 1991, the plaintiff entered into an agreement with the 1st defendant, who held a licence on State land, to extract sand and gravel from the licensed area for three years. The agreement was signed by a 3rd party, purportedly a partner of the plaintiff, on behalf of the plaintiff. By letter dated 25 May 1993 to the District Officer, Belaga, the said 3rd party and a 4th party who held between them 70% shares in the plaintiff relinquished their shares to one Chin Lew Chew @ Chin Mee Chew, who became the sole proprietor of the plaintiff, and by the same letter they further repudiated the agreement with the 1st defendant. The plaintiff subsequently filed a suit for specific performance and damages claiming breach of the agreement by the defendant. The defendant counterclaimed for damages claiming that the plaintiff had repudiated the agreement on 25 May 1993.

Question arose as to whether the third party had the mandate to sign the agreement on the plaintiff's behalf and whether he had the power to repudiate the same. The plaintiff contended that the 3rd party was a partner of the plaintiff at the material time who had since retired. However a record from the Pendaftaran Nama-nama Perniagaan, Kuching did not show that the 3rd party had been a partner in the plaintiff. Furthermore, the receipt for the renewal of the licence to extract sand and gravel stated that the sum was not received from the plaintiff which the plaintiff failed to explain. The defendant contended that there was inordinate delay in filing the application and triable issues.

Held:

[1] The parties have raised triable issues of both facts and law. It is obvious that these issues cannot be resolved by affidavit evidence and equally obvious is that the numerous affidavits have managed to create more issues both of facts and law rather than solve them. This is not a proper case for summary judgment.

[2] It is difficult to accept the plaintiff's Counsel's oral explanation at the hearing as to the reasons for the delay in making the O. 14 application. Nevertheless, the absence or unacceptability of an explanation given by the plaintiff for the delay is a question to be decided by the Court, it is not fatal *per se*. Unless it is clear that the defence is unsustainable, the Court may proceed to examine the merits of the case to determine whether or not summary judgment can be made in the case.

[Application dismissed with costs]

Cases referred to:
Jacobs v. Booth's Distillery Co. [1900] 85 LT 262 ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors. [1981] 1 MLJ 282 ***(cit)***
Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. & Ors. [1989] 3 MLJ 164 ***(cit)***
Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] 2 MLJ 183 ***(refd)***
Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd. [1988] 2 MLJ 397 ***(dist)***
Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd. [1986] 2 MLJ 134 ***(cit)***
Abdul Manaf Mohd. Ghows v. Nusantara Timur Sdn. Bhd. [1994] 2 CLJ 379 ***(cit)***
McLardy v. Slateum [1890] 24 QBD 504 ***(refd)***
Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 ***(dist)***
Tractors Malaysia Bhd. v. Joseph Thambirajah [1986] 2 CLJ 72 ***(foll)***
K & N Kenanga Sdn. Bhd. v. Latchman Dass s/o Shewaram [1986] 2 CLJ 136 ***(refd)***
UMW (Sarawak) Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors. [1989] 3 MLJ 177 ***(cit)***
B-Trak Sdn. Bhd. v. Bingkul Timber Agencies Sdn. Bhd. & Anor. [1989] 1 MLJ 124 ***(cit)***
Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd. [1969] 2 MLJ 98 ***(refd)***
United Manufacturers Sdn. Bhd. (In Receivership) v. Guru Timber Sdn. Bhd. & Anor. [1986] 1 MLJ 168 ***(cit)***
Huo Heng Oil Co. (EM) Sdn. Bhd. v. Tang Tiew Yong [1987] 1 MLJ 139 ***(cit)***
Public Bank Bhd. v. Malamaju Enterprise Sdn. Bhd. & Ors. [1989] 2 MLJ 112 ***(cit)***

Legislation referred to:
Rules of the High Court 1980 O. 14, O. 18 r. 19

Other sources referred to:
Supreme Court Practice 1993
Mallal's Supreme Court Practice

For the plaintiff - Belinda Hii; M/s. Hii & Hii
For the 1st, 2nd and 3rd defendants - Awang Bemee Hj. Awg. Ali Basah; M/s. Jaini & Mardi Associates
For the 4th defendant - Michele Lau; M/s. Lau & Co.

JUDGMENT

Hj. Muhammad Kamil bin Awang JC:

This is an application for a summary judgment under O. 14 Rules of the High Court 1980 or alternatively under O. 18 r. 19. The application is supported by the affidavits of Chin Pak Chong dated 5 April 1994 and 6 May 1994. In opposition there are the affidavits of the defendants dated 21 April 1994, 22 April 1994, 23 May 1994 and 27 May 1994. At the hearing of the application, the plaintiff indicated that it is proceeding with the application under O. 14 Rules of the High Court only.

Batu Emas Enterprise, a firm (the plaintiff) is suing Syarikat Awang Radin, a firm (1st defendant), 2nd and 3rd defendants who are partners of the 1st defendant, and Maju Belaga, a firm (4th defendant), engaged as a contractor by the 1st defendant. In the statement of claim it is stated that the plaintiff and the 1st defendant had entered into an agreement on 17 October 1991, whereby the 1st defendant (the licensee) had engaged the plaintiff to extract sand and gravel from its licensed area, consisting of an area of State land, being part of the bed of Batang Rejang in the vicinities of Sg. Beguan, Belaga for a period of 3 years. The plaintiff alleged that the defendants had breached the agreement, particularly clauses 9, 10 and 12 of the said agreement and claimed for an order of specific performance of the agreement or damages in lieu. For ease of reference, clauses 8 to 15 of the agreement are as follows:

> 8. The Contractor shall pay the deposit on royalties in the sum of RM10,000 and further royalties in future if any.

9. In consideration of the premises aforesaid and hereunder contained, the contractor shall pay the licensee the following:

    (a) RM6 per crate of gravel removed.

    (b) RM3 per crate of sand removed.

10. All the moneys stated in cl. 9 *supra* shall be paid monthly based on the royalty bills.

11. The licensee shall provide one worker on site to supervise and record the quantity of the sand and gravel removed by the contractor.

12. The licensee shall not assign, or sub-contract the contract work or any part thereof to any third party and if the licensee breaches this clause, the licensee shall pay a compensation sum of RM50,000 to the contractor.

13. In the event that the contractor stops the contract work, unless such stoppage is caused by low water level in the licensed area or is due to crane breaking down or failure, then the contractor shall pay a compensation sum of RM50,000 to the licensee.

14. The licensee hereby undertakes to assist, when and as requested, the contractor to apply execute, sign and deliver all relevant documents and applications in relation to the said licence or the renewal or extension thereof.

15. The licensee shall be responsible to pay compensation (sagu hati) to Penghulu Ajang Serik of Rumah Sekapan Peit, Belaga.

In the defence, the defendants claimed that the plaintiff had repudiated the said agreement and counterclaimed for damages that had been caused by the breach. It is to be observed that the agreement between the plaintiff and the 1st defendant was signed by one Mohamad bin Ahak who signed on behalf of the plaintiff. And in a letter to the District Officer, Belaga dated 25 May 1993 Mohamad bin Ahak and Zainie bin Jamjam who held between them 70% shares in Batu Emas Enterprise had relinquished their shares in the plaintiff firm in favour of one Chin Lew Chew @ Chin Mee Chew, who then became the sole proprietor of the plaintiff firm. By the same letter, both shareholders Mohamad bin Ahak and Zainie bin Jamjam had repudiated the agreement entered into by the plaintiff and the 1st defendant on 17 October 1991. If this repudiation by the plaintiff is correct then the plaintiff had committed a breach of cl. 13 and the defendants counterclaimed against the plaintiff compensation in the sum of RM50,000 in accordance with the provisions of that clause. The Counsel for the defendants raised two points for the consideration of the Court:

(1) The plaintiff has committed an inordinate delay in making this application and it is fatal to the application.

(2) There are triable issues raised which require a full hearing at a proper trial.

I will deal with the second point first, whether the defendants have raised a triable issue or question which needs to be argued fully in a proper trial.

The House of Lords in *Jacobs v. Booth's Distillery Co.* [1900] 85 LT 262 explained O. 14, in the words of Halsbury L.C.:

> People do not seem to understand that the effect of O. 14 is that, upon the allegation of the one side or the other, a man is not permitted to defend himself in a Court; that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it had not been in aid of the expense, and where it had not been in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

Order 14 appears to be punitive in nature, as "a man is not permitted to defend himself in a Court; that his rights are not to be litigated at all" (*Jacobs v. Booth's Distillery Co., supra*).

There has been a long line of authorities for the proposition that where all the issues are clear and the matter of substance can be decided once and for all without going to trial, there is no reason why the Court hearing the application for summary judgment should not deal with the whole matter under the procedure in an O. 14 application. See the Federal Court and Supreme Court cases: *Citibank NA v. Ooi Boon Leong & Ors.* [1981] 1 MLJ 282 and *Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. & Ors.* [1989] 3 MLJ 164 respectively.

In *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183, the Supreme Court stated that the Court on hearing an O. 14 application should work within the framework of O. 14 and not embark on an exercise under O. 33 r. 2 which empowers the Court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before the trial of the matter or cause.

The learned Counsel for the plaintiff submitted that in *Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd.* [1988] 2 MLJ 397 it was held that once compliance had been made by the plaintiff with O. 14 r. 2, the burden falls upon the defendant to satisfy the Court with respect to the claim or part of the plaintiff's claim that there is an issue or question in dispute which ought to be tried and for some other reason to be a trial of the claim or part thereof. Learned Counsel for the plaintiff submitted that in this respect, the defendants had not discharged the burden. With respect, in the present case the basis of the claim by the plaintiff is not clear-cut, there are serious questions disputed and there are other question of facts which need to be proved by the plaintiff. In my view, the basis of the claim must be clear and free from ambiguities, and this is not the case here.

The cause of action in the present case is founded on the fact of a breach of agreement dated 17 October 1991. It raises numerous questions of both facts and law which cannot be settled by affidavit evidence alone and which need to be argued fully in a proper trial. The agreement in question was made between Batu Emas Enterprise (plaintiff) and Syarikat Awang Radin (1st defendant). According to the plaintiff, Mohamad bin Ahak was a partner of Batu Emas at the material time and he signed the agreement on behalf of Batu Emas. Then he retired from Batu Emas. There is no evidence in support of the contention that Mohamed bin Ahak became a partner nor that he had retired from the firm. A record from the Pendaftaran Nama-nama Perniagaan, Kuching was produced which states that Batu Emas Enterprise was registered on 6 August 1991 under registration No. 29923, whose partners are Chin Lew Chew @ Chin Mee Chew (40%), Mening Killah (30%) and Chin Pak Chong (30%). There is no evidence to show that Mohamed bin Ahak had been a partner in the plaintiff firm. Yet the agreement in question was signed by Mohamed bin Ahak for and on behalf of Batu Emas Enterprise. We are not told who Mohamed bin Ahak is and how he fits in the Batu Emas establishment *vis-a-vis* the documentary evidence (the registration).

The licence to extract sand and gravel held by the defendant firm had expired on 2 November 1992, which renewal was sought and granted by the Land and Survey Department. The plaintiff stated in its affidavit that a sum of RM600 was paid for the renewal of the licence to the 1st defendant and the 1st defendant had acknowledged the receipt thereof and issued a receipt No. 0116 dated 3 November 1992. But the said receipt clearly stated that the said sum was received from Syarikat Dian Lulo and not Batu Emas Enterprise and it was "in payment of commission for batu and pasir". There is no explanation for this by the plaintiff.

The defendant averred that a letter dated 25 May 1993 written by Mohamad bin Ahak who the plaintiff had ostensibly held out as having the power in signing on its behalf the agreement

dated 17 October 1991 had clearly stated that two of the partners had divested their 70% shares in Batu Emas in favour of Chin Lew Chew, who thus became the sole proprietor of the firm. The letter states as follows:

> Pegawai Daerah,
> Pejabat Daerah,
> Belaga.
>
> Tuan,
>
> **Penarikan Diri Sebagai Pemegang Syer**
>
> Adalah dengan segala hormatnya saya, Mohamad bin Ahak (BIC. K.742652) dan Zainie bin Jamjam (BIC. K.634600) menarik diri sebagai pemegang syer Batu Emas Enterprise yang berjumlah 70%. Dengan ini syer kami yang berjumlah 70% itu kami serahkan kepada Encik Chin Lew Chew @ Chin Mee Chew dan ini bermakna Batu Emas Enterprise menjadi milik perseorangan Encik Chin Lew Chew @ Chin Mee Chew mulai dari 25 Mei 1993.
>
> Dengan ini juga segala perjanjian kami dalam Batu Emas Enterprise adalah dibatalkan mulai dari tarikh yang sama.
>
> Untuk makluman pihak tuan, Batu Emas Enterprise telah didaftar di pejabat tuan dengan nombor pendaftaran 27/91.
>
> Segala kerjasama pihak tuan untuk menguruskan perkara ini adalah sangat-sangat kami hargai dan kami dahului dengan ucapan ribuan terima kasih.
>
> Sekian, terima kasih.
>
> Kami yang benar,
>
> Sgd: (Mohamad bin Ahak)
> No. 60, Sg. Bedil Besar,
> 93050 Kuching.
>
> (Zainie bin Jamjam)
> No. 1, Jalan Wharf,
> 96900 Belaga.
>
> Tarikh: 25 Mei 1993.

Assuming that Mohamed bin Ahak was a partner and had been given a mandate to sign the agreement between Batu Emas Enterprise and Syarikat Awang Radin on 17 October 1991, had he the power to repudiate the agreement by this letter of 25 May 1993? Who is this Zainie bin Jamjam mentioned in the letter and who had claimed to be a shareholder of Batu Emas Enterprise?

On 28 May 1993, the defendants through their solicitors wrote to the plaintiff that by this letter of Mohamad bin Ahak the plaintiff had repudiated the agreement and was therefore in breach of the agreement and counterclaimed for a compensation against the plaintiff for the breach.

It will be seen in this case that the parties have raised triable issues, both of facts and law. It is obvious that these issues cannot be resolved by affidavit evidence and equally obvious is that the numerous affidavits have managed to create more issues both of facts and law rather than solve them. I do not think that this is the right and proper case for a summary judgment.

Now, I come to the first point raised by the learned Counsel for the defendants whether an unexplained delay in making the application under O. 14 is fatal to the application.

The statement of claim was filed on 14 September 1993 and the defence and counterclaim were filed on 20 October 1993 and 21 October 1993 respectively and the reply by the plaintiff on 21 October 1993. The defendants submitted that there had been an inordinate delay in making this application on 8 April 1994, and the plaintiff in its affidavit dated 5 April 1994 in support of this application had given no explanation or reason for the delay in the application. Learned Counsel submitted that a delay of about 6 months after the defence had been filed is an inordinate delay and as there is no explanation for the delay, it is fatal to the application. In support of his proposition, the learned Counsel for the defendants cited *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd.* [1986] 2 MLJ 134 and *Abdul Manaf Mohd. Ghows v. Nusantara Timur Sdn. Bhd.* [1994] 2 CLJ 379 as authorities on this point.

The Supreme Court in *Krishnamurthy's* case (*supra*) held that the application under O. 14 must be made after an appearance had been entered and it could be made either before or after the delivery of defence, but the plaintiff must explain the delay. In *Abdul Manaf Mohd. Ghows's* case (*supra*), where a delay of 2 months after defence had been filed and no explanation whatsoever was offered for the delay the Court held that no summary judgment should have been entered for the plaintiff. And it also held in the case that the various issues raised by the defence and reply and highlighted in the affidavits could only be determined at the trial. On the point of delay, the learned Judge appears to have said that he felt bound by the principle as laid down in *Krishnamurthy's* case.

The *locus classicus* on O. 14 is *McLardy v. Slateum* [1890] 24 QBD 504 where the plaintiff applied for judgment under O. XIV about a month after the defence was delivered. The master made an order giving the defendant leave to defend upon paying the whole amount into Court. On appeal, Field J set aside the master's order on the ground that an application under O. XIV could not be made after the delivery of the defence. The plaintiff appealed. The Court allowed the appeal and ordered the case be sent back to the Judge in Chambers to be heard on its merits. Pollock B. said (at p. 506):

> The view taken by other Judges, and by the masters, is that the intention of O. XIV, r. 1, was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O. XIV right and proper. We think that this is the proper construction of the rule.
>
> Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O. XIV, r. 1, because a defence has been delivered. The master was right in considering the facts and making an order, and this appeal must be allowed.
>
> If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

Pollock B. did not suggest nor advocate that if the plaintiff failed to discharge the onus, it was fatal to the plaintiff's case. The words "under the special circumstances of the case" appear to me that the Court has a discretion to decide whether the delay is justifiable or whether it is justifiable, even if there is no explanation given.

The proposition that where there is a delay in making an O. 14 application after the delivery of defence and the applicant has failed to explain the delay or the explanation for the delay is unacceptable to the Court, the application must necessarily fail. It is suggested that *Krishnamurthy's* case is the authority for such a proposition. In *Krishnamurthy's* case, His

Lordship Salleh Abas LP said:

> In the second place the law as to the time when an application for an O. 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made before or after the delivery of the defence provided that where it was made after the delivery of defence, the plaintiff must explain the delay. If this explanation was not accepted by the Court, no O. 14 judgment could be signed. This is the *ratio decidendi* in *McLardy v. Slateum.*
>
> In the present appeal no defence was ever filed in by the appellants and other defendants. All that the respondents did before applying for the judgment was to await the next move to be made by the appellants and their co-defendants after appearances had been entered by them. We do not think that the delay in this case is such as to inhibit the Court from granting the respondents' application for an O. 14 judgment.

In *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 although there was a delay in the case, the plaintiff did not discharge the onus as to why he did not make the application sooner and the Court gave judgment for the defendant. His Lordship Abdoolcader J said:

> The intention of the rules was that the application for summary judgment should be made before a defence had been delivered in ordinary course. However, the plaintiff was not precluded from making it afterwards. In such an event, the onus was on the plaintiff to show why he did not apply sooner.
>
> Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put to terms of paying into Court as a condition of leave to defend (*Jacobs v. Booth's Distillery Co.*).
>
> Where there was no defence to the plaintiff's claim, so that the plaintiff should not be put to trouble and expense of proving it, but the defendant set up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment on the claim with a stay of execution until the trial of a counterclaim (*Sheppards & Co. v. Wilkinson & Jarvis* [1889] 6 TLR 13, C.A.).

In *Tractors Malaysia Bhd. v. Joseph Thambirajah* [1986] 2 CLJ 72 Zakaria Yatim J referred to the above case and came to the conclusion that the Court has power to enter summary judgment against the defendant even though the application was made one year after the defence was filed and there was no explanation given for the delay. There are also many cases where a preliminary objection on the ground of delay on the part of the plaintiff in applying for summary judgment have been successfully upheld. In *K & N Kenanga Sdn. Bhd. v. Latchman Dass s/o Shewaram* [1986] 2 CLJ 136, the defendant appealed against the decision of the Senior Assistant Registrar in allowing the plaintiff's application to enter summary judgment and a technical point was raised with regard to the inordinate delay on the part of the plaintiff in filing the O. 14 application. The same Judge, in allowing the appeal had this to say:

> I have considered the explanation given by the Counsel for the plaintiff and I am unable to accept the reasons given by him. When the plaintiff issued the writ they should have been prepared with all the relevant documents. The defence had not raised any complicated issue and there was not even a counterclaim. In my judgment there was clearly inordinate delay by the plaintiff when O. 14 application was filed 12 months after the defence was delivered. The plaintiff failed to give any acceptable explanation for the delay.

See also *UMW (Sarawak) Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors.* [1989] 3 MLJ 177 and *B-Trak Sdn. Bhd. v. Bingkul Timber Agencies Sdn. Bhd. & Anor.* [1989] 1 MLJ 124.

A case must be dealt with on its merits, and where after deciding that it is not an inordinate delay and does not warrant a dismissal of the application, the Court should decide on the case.

In the present case, I find it difficult to accept the plaintiff's Counsel oral explanation at the hearing as to the reasons for the delay in making the O. 14 application, nevertheless I proceeded to examine the merits of the case and decided whether or not there was a triable issue raised by the defence. In my judgment the absence or unacceptability of an explanation given by the plaintiff for the delay is a question to be decided by the Court. Unless it is clear that the defence is unsustainable, the Court may proceed to examine the merits of the case to determine whether or not a summary judgment can be made in the case. I am fortified and feel strengthened by the words of His Lordship Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98 who said (at p. 99):

> The course that I have taken is further strengthened and justified by the findings I have made below. It will be convenient to look at the pleadings in this case and to consider the defence in the light of whether it is *bona fide* or whether it raises any triable issues.
>
> Having considered all aspects of the case, I am satisfied that there is no question of fact or law which ought to be tried or argued in this case; and I am further satisfied that the defendant company has not shown that it has a *bona fide* defence. If the plaintiff is precluded from the application for summary judgment, it would only mean unnecessary prolongment of the case, resulting in a waste of time and added expense for the defendant company.

See also *United Manufacturers Sdn. Bhd. (In Receivership) v. Guru Timber Sdn. Bhd. & Anor.* [1986] 1 MLJ 168; *Huo Heng Oil Co. (EM) Sdn. Bhd. v. Tang Tiew Yong* [1987] 1 MLJ 139 and *Public Bank Bhd. v. Malamaju Enterprise Sdn. Bhd. & Ors.* [1989] 2 MLJ 112.

A plaintiff is not precluded from applying for a summary judgment after the defence has been filed even though there is no explanation given for the delay in making the application under O. 14. It is submitted that in *McLardy v. Slateum* (*supra*), the onus on the plaintiff had not been discharged and in *Krishnamurthy's* case (*supra*), no defence was filed at all and this does not "inhibit the Court from granting the respondent's application for an O. 14 judgment". There is no mention made in the *Supreme Court Practice* 1993 nor in *Mallal's Supreme Court Practice* that the absence of or an unacceptable explanation for the delay in making an application under O. 14 is fatal to the plaintiff. Therefore in *Krishnamurthy's* case the statement that where there is a delay in making an application under O. 14 after defence has been filed the applicant must explain the delay otherwise no O. 14 application can succeed appears to be *obiter dictum.*

In the light of the above, it seems to me that where there is no explanation for a delay in making an application under O. 14, it is not fatal per se. It is for the Court to exercise its discretion in determining whether or not to proceed with the hearing of the application even though there is no explanation for the delay in making the application. With respect, I am unable to accept the learned Counsel's proposition that a delay in making an O. 14 application which is not explained is fatal to the application.

In the circumstances and based on all the evidence, the application is dismissed with costs.